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**In the Supreme Court of the
United States**

OCTOBER TERM, 1939

No. 181 ✓

HERBERT FLEISHHACKER,
Petitioner,
vs.

LUCIEN BLUM, EDMOND LANG, ELIZABETH LANG, RENE FOULD, ESTHER FOULD, MAX LAZARD, ROGER HAAS, ANDRE HAAS, LUCIE EMILE LEWY-LIER, S. A. JOHANESSON, G. O. HOFFMAN and HENRY LEON,
Respondents.

**Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit
and Supporting Brief**

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Respondents.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable, the Supreme Court of the United States:

Herbert Fleishhacker prays that a Writ of Certiorari issue to review the decision (R 924) of the Circuit Court of Appeals for the Ninth Circuit made in the above entitled cause on February 7, 1940, which affirms the decision of the District Court for the

Northern District of California, Southern Division, as against Petitioner, rendered March 29, 1938. (R 320)

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a stockholders' suit to recover an alleged secret bonus or bribe received by the President of a National Bank (Petitioner herein) for allegedly procuring a loan of the Bank's funds.⁽¹⁾

The loan, amounting to \$325,000, was made in December 1919. It was secured by Liberty Bonds, and was repaid in four months.

Fourteen years later, on December 5, 1934, twelve French citizens holding 1554 shares of stock of the Bank⁽²⁾ out of 770,000 outstanding, some of whom

(1) This then was and still is a criminal act. 12 U. S. C. Sec. 595 reads:

"Except as herein provided, any officer, director, employee, or attorney of a member bank who stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, any loan from or the purchase or discount of any paper, note, draft, check, or bill of exchange by such member bank shall be deemed guilty of a misdemeanor and shall be imprisoned not more than one year or fined not more than \$5,000, or both."

(2) The bank is the Anglo-California National Bank of San Francisco. At the time of the loan its name was Anglo and London Paris National Bank of San Francisco.

were then engaged in other litigation against the Bank and its President, filed this suit.⁽²⁾ Their purpose in initiating the matter was to obtain proofs of frauds that might aid in the other litigation. (R 459)

On March 29, 1938, the District Court entered judgment against Petitioner for \$736,485.57 (being \$348,125 alleged bribe, and \$388,360.57 interest thereon).⁽³⁾

The Background.

L. B. Barde and J. N. Barde were brothers conducting a general steel business in Portland, Oregon, through a corporation, M. Barde & Sons, Inc. (R. 176)⁽⁴⁾ which on December 23, 1919, had a net worth of \$750,000. (R 180, 607)⁽⁴⁾ For some time they had done business with the Bank and enjoyed an unsecured credit line of \$111,000. (R 176)⁽⁴⁾

The Bardes knew Petitioner: one of them had married Petitioner's cousin. On numerous occasions they had sought to interest Petitioner in various ventures on a 50-50 partnership basis. Petitioner was a man of large means and engaged in many business enterprises. (R 621, 654-63, 701-4)

The Partnership Agreement.

Some time prior to December 1919 L. B. Barde invited Petitioner to become a 50-50 partner with the Bardes in a venture to buy and resell surplus

(2) These are the Respondents herein. For convenience they are referred to as plaintiffs.

(3) Petitioner's affairs are now in the bankruptcy court.

(4) This fact found by trial court in its opinion.

wartime steel of the United States Shipping Board of the value of about \$40,000,000. (R 176)⁽¹⁾ The capital required, in cash or credits, was \$1,000,000. (R 176)⁽¹⁾ The proposal was that the Bardes would supply \$500,000 in cash and Petitioner \$500,000 in cash, securities, or a bond, as required by the Shipping Board (R 177)⁽¹⁾ and each was to receive a half interest in the enterprise. (R 176)⁽¹⁾ This was agreed to between L. B. Barde and Petitioner, subject to an investigation as to the feasibility of the venture. (R 177)⁽¹⁾ The actual requirements of the Shipping Board as to security were not then definitely known. (R 702)

Investigation convinced the parties that the venture was promising, (R. 664, 702) and L. B. Barde ascertained that the Shipping Board requirements would be earnest money of \$250,000 with the bid; and if accepted, the contract must be secured by \$400,000 in cash, and by a surety bond of \$500,000. (R 176)⁽¹⁾ It was estimated that cash working capital of \$100,000 would be required. (R 176)⁽¹⁾ This made the total requirements \$500,000 cash (to be supplied by the Bardes) and \$500,000 surety bond (to be supplied by Petitioner, who had agreed to supply cash, securities or a bond as required by the Shipping Board). (R 177, 702)⁽¹⁾ The parties agreed to proceed on these terms as originally proposed. (R 177, 298)⁽¹⁾⁽²⁾

At this time, as the trial court found in its opinion, it had not been suggested to Petitioner that the Bardes

(1) This fact found by trial court in its opinion.

(2) This fact found by trial court in its formal findings.

would want to borrow from the Bank to finance their capital contribution, (R 177)⁽¹⁾ and Petitioner believed the Bardes had the cash to finance their share. (R 675, 696)

The Loans.

When the time came to put up the money, and not until then, (R 177, 298) ⁽¹⁾ ⁽²⁾ the Bardes informed Petitioner they desired to borrow and asked whether they could borrow at the Bank. (R 177)⁽¹⁾ Petitioner presented their application to the Bank's Finance Committee (R 624-6, 634, 645-6, 678-9, 681, 700) its lending agency (R 204, 678), which was advised by Petitioner (R 629, 646-7) and knew that the proceeds were to be used by the Bardes in this venture and that Petitioner had a half interest therein as a partner. (R 176, 190)⁽¹⁾ Petitioner recommended the loans as safe loans, which fact the trial court found true. (R 178, 186)⁽¹⁾ The Finance Committee, Petitioner not acting, authorized loans aggregating \$325,000 to the Bardes, on 6% demand notes of M. Barde & Sons, Inc. endorsed by J. N. Barde and secured by \$225,000 to \$250,000 of Liberty Bonds. (R 178-9)⁽¹⁾ As already noted, the Bardes had done business with the Bank for some time and enjoyed an unsecured credit line of \$111,000. (R 176)⁽¹⁾

The fact that Petitioner was a partner in the venture and that the proceeds were to be used therein,

(1) This fact found by the trial court in its opinion.

(2) This fact found by the trial court in its formal findings.

were common knowledge in the Bank at the time. (R 190, 313, 428-9, 604-5, 611-12, 624, 629, 679, 700) The Bardes obtained the remaining \$175,000 of cash for their capital contribution by borrowing at the Central National Bank of Oakland, on their note guaranteed by Petitioner. (R 179)⁽¹⁾

Petitioner supplied his agreed 50% contribution by obtaining a \$500,000 surety bond from the Fidelity and Deposit Company of Maryland, executing therefor his personal indemnity in that amount. (R 86, 181)⁽¹⁾ This bond was accepted by the Shipping Board and continuously secured the faithful performance of the contract of purchase. (R 86, 181, 303)⁽¹⁾⁽²⁾

The Shipping Board having accepted the bid, the Barde Steel Products Corporation⁽³⁾ was organized to conduct the venture. Its stock was issued one-half to the Bardes and one-half to Petitioner's nominees.

The venture proceeded. Within four months the Steel Corporation repaid the \$325,000 loan made by the Bank to the Bardes, charging the partners therefor on its books—Petitioner being charged one-half. Petitioner's liability on his \$500,000 bond continued thereafter, and until termination of the contract with the Shipping Board.

The Profits.

Petitioner received from the Corporation the following:

-
- (1) This fact found by the trial court in its opinion.
 - (2) This fact found by the trial court in its formal findings.
 - (3) For convenience called the Steel Corporation.

On October 1, 1922 (almost two years after the inception of the venture) he was credited with a dividend of \$73,125: salary, September 20, 1920, \$50,000: March 16, 1921, \$25,000.⁽¹⁾

Finding the Bardes were withdrawing funds from the venture without proper accounting, Petitioner withdrew on March 22, 1923, the Bardes purchasing his interest for \$200,000.⁽²⁾ (R 181, 425-6, 437, 689-94)

The aggregate of the above constitutes the proceeds of the alleged bonus paid Petitioner (\$348,125) and with interest (\$388,360.57) makes up the judgment of \$736,485.57.

This Suit.

In October, 1932, an attorney employed by one Etienne Lang to investigate certain claims against the Bank arising out of oil transactions, called his attention to an item in a detective's report showing that Petitioner had been a partner in the steel venture with the Bardes. He advised investigating the matter because it might prove to be of assistance in the oil claims. (R 459) The investigation was made. On October 29, 1934, Lang wrote demanding that the Bank bring action against Petitioner. (R 30) On November 13, 1934, the Bank's Board of Directors adopted a resolution

(1) The profits of the Steel venture were as follows:

1920—\$95,253.28

1921—140,946.14

1922—141,807.94 (R 411)

(2) This fact found by the trial court in its opinion.

to the effect that the claim had been investigated, that it was without merit, and that no action be brought. (R 72) On December 5th this suit was filed.

Plaintiffs own, in the aggregate, 1554 shares of the stock of the Bank, out of 770,000 shares outstanding (.2 of 1%). They owned only 174 shares at the time of the transaction. (R 46, 494, 585, 132)⁽¹⁾

There is no evidence that any stockholder, other than plaintiffs, favored or favors this suit.

Summary.

The following essential facts are not disputable:

1. The Bardes and Petitioner were 50-50 partners in the venture and each contributed half the capital as agreed (Bardes \$500,000: Petitioner \$500,000 in cash, securities or a bond as required). Each had a 50% liability for all losses, capital as well as operating.

2. Petitioner did not know the Bardes would or might want to borrow at the Bank or elsewhere; believed they had the cash: and the question of borrowing was not broached until after the partnership venture had been finally agreed upon.

3. The loans to the Bardes were authorized by the Finance Committee (Petitioner not acting) with full knowledge that the proceeds were to be used in this venture and that Petitioner was a partner therein.

(1) The holders of these 174 shares were the only qualified plaintiffs (Eq. Rule 27, Civil Procedure Rule 23 (b)). There is no evidence of devolution by operation of law.

4. The loans were desirable loans, were secured by Liberty Bonds, were "fully protected" as found by the trial court in its opinion and were repaid in four months.

5. The loans were handled in the usual course; no customary step was omitted: Petitioner's interest in the venture was common knowledge in the Bank.

6. When the loans were made it was lawful for a National Bank President and his partners and enterprises in which he was interested, to borrow from his bank, and such loans were ordinary and not subject to criticism; today under Act of Congress, loans may be made to a partnership in which a National Bank President does not have more than a 50% interest.

7. The plaintiff stockholders held 174 shares of stock in the Bank when the transaction took place; the inception of the suit was grounded upon their desire to develop facts helpful to them in disconnected litigation against the Bank and Petitioner; no other stockholders joined the plaintiffs.

8. Plaintiffs' demand on the Bank that it bring suit was considered and investigated by its Board of Directors, which by resolution found the claim should not be prosecuted and declined. There is no evidence whatever, and no finding, that the Bank or its Directors were ever controlled or dominated by Petitioner, or that they ever had any interest in the transaction.

9. There is no evidence whatever that the refusal of the Board of Directors to accede to the demand of Lang that suit be brought was wrongful or con-

stituted a breach of trust, or was in bad faith, or resulted from domination or control by Petitioner or others in his behalf, or was anything other than an exercise of the directors' honest discretion.

10. The trial court excluded as immaterial the evidence offered by Petitioner that the refusal of the Board of Directors to accede to Lang's demand was a free and voluntary act taken in good faith, without domination or control by Petitioner or anyone in his behalf or interests adverse to the Bank, and without any breach of trust or wrongful conduct, and in the exercise of the Board's honest discretion as to the rights and best interests of the Bank. (R 631-2, 755-60, 786-94; Assigned Error No. 7)

11. The trial court also excluded the evidence offered by Petitioner that Lang's demand for suit was made in bad faith with the object of compelling the Bank to buy its peace by settling the oil land suit which Lang and some of Respondents were then prosecuting against the Bank and Petitioner. (R 631-2, 755-60, 786-94)

12. The suit was not filed until 15 years after the transaction took place. In the interim 13 of the 19 directors then in office died; two of the four members of the Finance Committee died; other officers and employees whose testimony would have been valuable, died; records and documents are missing.

OPINIONS BELOW.

Opinion of the trial court: (R 175) 21 Fed. Supp. 527.

Opinion of the Circuit Court of Appeals: (R 900) 109 F. (2d) 543.

JURISDICTION.

The decision of the Circuit Court of Appeals was rendered February 7, 1940. A petition for rehearing was seasonably filed March 7, 1940: it was duly entertained and denied April 3, 1940. (R 933) The mandate has been stayed until July 3, 1940, and thereafter until disposition of the matter by this Court. (R 936)

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code. (U. S. Code, Title 28, Section 347)

THE ACTION OF THE COURTS BELOW.**Contentions of the Parties.**

The theory advanced by plaintiffs was that Petitioner, President of the Bank, demanded or exacted as a condition to the Bank's lending \$325,000 to the Bardes, that he be given a bonus of one-half of the profits of the venture; that plaintiff stockholders had demanded the Bank file suit; that the directors refused; that they were dominated by Petitioner.

The defense was threefold:

1. That while Petitioner recommended the loans, he did not receive his interest in the steel venture for so doing, or in whole or in part for the loans, but he received it in consideration of contributing his agreed half of the partnership capital: that he did not make the loans (which had never been mentioned when the partnership was formed) on behalf of the Bank but such loans were made by the Bank's Executive Committee, with knowledge (supplied by Petitioner) that he had a half interest in the venture and that the funds were to be used therein.

2. That Equity Rule 27 and the substantive law expressed thereby, was not complied with, and plaintiffs could not maintain the action because the cause of action, if any, belonged to the Bank, and the refusal of the Board of Directors to bring suit was not wrongful, but in good faith, the Board of Directors not being interested adversely to the Bank or in the transaction or dominated or controlled by the Petitioner.

3. That the action was barred by laches and the Statute of Limitations,⁽¹⁾ because the delay of 15 years in filing it was unexcused; that the facts of the transaction complained of were known to the Bank

(1) California Code of Civil Procedure §338 sub. 4 provides that an action for relief on the ground of fraud or mistake must be brought within 3 years, and that "the cause of action in such case (is) not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake."

and its officers at the time, and great prejudice had resulted from the long delay.

The Action of the Trial Court.

1. On the merits the trial court found that although the partnership agreement was made and Petitioner had his interest therein before he knew or it was suggested that the Bardes would want to borrow, nevertheless Petitioner violated his trust to the Bank: that "a part of the consideration for the loan * * * was the participation by Herbert Fleishhacker with them in the profits of the steel deal; that Herbert Fleishhacker made a private profit for himself in the discharge of his official duties." (R 196) Although plaintiffs had charged that Petitioner had demanded that he be given a half interest in the venture in consideration of procuring the loans, there was, they admitted (R 705) and the court found, no proof of this, the court merely finding by a process of inference from the fact that the proceeds of the loans contributed to the success of the venture, that there was an implied agreement that part of the consideration for the loans was Petitioner's participation in the venture.

2. The court held that Equity Rule 27 had been complied with solely upon the grounds (a) "In acknowledging receipt of this demand (that the Bank sue), the chairman of the board stated that he would communicate with Etienne Lang later. No such communication was ever sent or received;"⁽¹⁾ (b) "No

(1) The demand was dated October 29, 1934; suit was filed December 5, 1934.

request was made that Lang appear and offer proof of the charges made. The board merely passed a resolution that no action be taken"; (c) "Thereafter the directors made common cause with Herbert Fleishhacker in seeking to justify his acts"; (d) "It is permissible to conclude from these facts, as said by plaintiffs' counsel, 'that the directors were either under the domination of Fleishhacker or saw fit to accept his denial of wrongdoing.'" (R 195-6)⁽¹⁾

The trial court made no mention of its refusal to permit Petitioner to introduce evidence to show the reasons for the Bank's refusal to sue.

3. The trial court held the action was not barred by laches or the Statute of Limitations because "* * * while the officers of the Anglo knew of the transaction, it was not at that time known to plaintiff stockholders. Besides the question of secrecy is immaterial" (R 191); that the plaintiff stockholders did not discover the facts until 1933, and since suit was filed in 1934, it was filed in time. (R 196)

We urge a reading of the opinion of the trial court (R 175), which contains a recital of the facts with which Petitioner in the main agrees (although some important facts are omitted and erroneous inferences

(1) Judge Mathews in his dissenting opinion in the court below (R 922) pointed out that these circumstances which formed the sole basis for the trial court's conclusion on this point constitute no sufficient showing to enable plaintiffs to maintain the suit and said "I find here a total lack of any factual showing entitling appellees to maintain this suit". (R 920)

are drawn) and which shows clearly the basis for that court's decision.

The Action of the Circuit Court of Appeals.

On appeal, among other points, Petitioner urged:

1. That on the face of the trial court's opinion and findings, it was impossible to infer the existence of an agreement for a bonus, because the court found that the partnership agreement was made before it was even suggested that the Bardes would or might want to borrow.

2. That on the face of the trial court's opinion and findings, Equity Rule 27 had not been complied with because there was no allegation, no evidence and no finding, that the Directors, in refusing to bring suit, had committed a breach of trust; hence plaintiff stockholders were not entitled to assert a cause of action which, if it existed at all, belonged to the Bank and not to its stockholders.

3. That on the face of the opinion and the findings of the lower court (finding expressly that the officers of the Bank knew of Petitioner's interest in the transaction at the time), the action was barred by laches and the Statute of Limitations.

The decision of the trial court was affirmed as against Petitioner by a divided court.

The majority (Judges Healy and Stephens) sustained the trial court's decision by the following process of reasoning (R 900):

1. On the merits, the court below accepted the trial court's finding that Petitioner did not learn of the Bardes' desire to borrow until after the parties had entered into the partnership agreement, namely that \$1,000,000 of capital would be required; that the Bardes would supply half, in cash if required, that the Petitioner would supply the remaining half, in cash, securities, or a bond, as required by the Shipping Board, and that each would have a half interest.

But the court rejected (by ignoring it) the trial court's reasoning, and substituted therefor its own contradictory inferences of fact and legal conclusions. It found (a) that the original partnership proposal was made by the Bardes with the undisclosed intention of later requesting loans from the Bank (this proposition is original with the court; it is not suggested in the evidence, in the argument or briefs, or in the trial court's opinion or findings); (b) that after the parties had investigated the matter and agreed to proceed, the Bardes disclosed their desire to borrow, and requested a loan from the Bank; (c) that although the parties had agreed on the terms of the partnership, as outlined above, before the Bardes disclosed their desire to borrow, nevertheless the partnership agreement was still "at large", because, as it held, "the details were uncertain," (the trial court had no such idea and found to the contrary).

Having drawn these inferences of fact, the court concluded that Petitioner by continuing with the venture after the Bardes expressed their desire to borrow,

may be said to have agreed that the loans would be procured in consideration of his interest in the partnership.

2. As to Equity Rule 27, the majority, after pointing out that the complaint did not allege in so many words that the Directors' refusal to sue constituted a breach of trust, or was wrongful or improper, and that the trial court made no specific finding to that effect, nevertheless concluded that "It is obvious from the findings as a whole as well as from the opinion, that the court looked upon the Board's refusal to sue as amounting to a breach of trust". (R 911) No mention is made of the fact that there was no evidence to sustain such view, or of the refusal of the trial court to admit evidence offered by Petitioner to show the reasons for the Board's action and that it acted honestly and committed no breach of duty.

3. As to laches and the Statute of Limitations, the majority exhibited awareness that the trial court erred in holding that the Bank's knowledge of the alleged fraud was irrelevant, but it avoided the difficulty by contradicting the trial court's finding that the Bank had knowledge thereof in 1919.

The court below reached its conclusion that the action was not barred by laches or the Statute of Limitations by (a) summarizing the evidence which defendants had offered to show that all the essential facts of the alleged fraud were known, as a result of Petitioner's disclosure, to numerous officers of the Bank in 1919; (b) concluding (contrary to the trial

court) that that evidence was insufficient to prove that the Bank had notice in 1919; and (c) then finding on the basis of that same evidence alone, "that the proof is such as to require a finding that the Bank did not discover the fraud until appellees brought it to light [in 1933] by their investigations. Hence the action is not barred as to the Bank." (R 912)

The court failed to see that what was known in 1919 could not possibly sustain the burden of showing that no discovery was made in the 15 following years which passed before the suit was filed.

Judge Mathews in his dissenting opinion (R 915) demonstrated the "total lack of any factual showing entitling appellees to maintain this suit. There was neither allegation nor proof that Anglo's board of directors had done or threatened to do any act which was beyond the authority conferred on them by their charter or other source of organization; or that any fraudulent transaction had been completed or contemplated by the board of directors; or that the board, or a majority of them, were acting for their own interest, in a manner destructive of Anglo, or of the rights of other stockholders; or that a majority of Anglo's stockholders were oppressively and illegally pursuing a course, in the name of Anglo, which was in violation of the rights of other stockholders; or that irremediable injury would be suffered, or that a total failure of justice would occur, if the court did not exercise its preventive powers." (R 920)

He concluded that the decree should be reversed with directions to dismiss the bill of complaint.

Questions Presented.

The questions here may be summarized as follows:

1. Did the court below err (as Petitioner contends) in holding that this stockholder's derivative suit could be maintained under Equity Rule 27 (now Civil Procedure Rule 23), notwithstanding a failure by such stockholders to show either that the Directors' refusal to sue constituted a breach of trust or was wrongful or improper, or that the Bank or its Board of Directors is or ever was dominated or controlled by defendant? (See dissenting opinion in the court below, R 915.)

2. Did the court below err (as Petitioner contends) in failing to hold that the trial court committed error in excluding Petitioner's evidence offered to show (a) the investigation made by the Bank concerning the demand that it bring suit; (b) the reasons which impelled the Board of Directors to adopt a resolution not to bring suit; and (c) that this suit was brought for ulterior reasons, namely, to force settlement of a wholly unrelated controversy?

3. Did the court below err (as Petitioner contends) in failing to hold that this suit was barred by laches and by the Statute of Limitations because in the bill charging a fraud committed 15 years before suit was brought, no attempt was made to show that the Bank did not know the facts of the alleged fraud from the beginning, and where (although admittedly the burden was on plaintiffs to show the Bank did not have notice and to excuse the Bank's delay of 15

years before suit brought), no evidence was offered concerning what was known or became known to the Bank at any time thereafter?

4. Did the trial court violate an important principle of judicial administration (as Petitioner contends) in signing the findings prepared by the successful party without change, although they contradict that court's own view of the facts (as expressed in its opinion which it ordered the findings should follow) in several important particulars, and are in numerous respects contrary to the evidence?

5. Did the court below err (as Petitioner contends) in affirming the decision of the trial court (which was based on a palpably erroneous theory of law), by adopting a view of the facts which (we submit) contradicts the opinion and findings of the trial court and the evidence and admissions of plaintiffs' counsel?

6. Did the court below err (as Petitioner contends) in failing to find that Petitioner did not receive a bribe or bonus for procuring a loan of the Bank's funds, and in failing to find that he did not commit any breach of his fiduciary duty to the Bank?

REASONS FOR ALLOWANCE OF WRIT.

1. The Court below has Decided a Federal Question in a Way Conflicting with Applicable Decisions of this Court.

Federal Equity Rule 27 (Civil Procedure Rule 23-B) not only states a requirement of pro-

cedure, but a principle of substantive law, i.e., that a cause of action belonging to a corporation may not be asserted or enforced by a stockholder unless it is affirmatively shown (a) that upon demand the Board of Directors refused to bring suit (or that such demand would be unavailing); and (b) that the refusal of the Directors to bring suit constituted a breach of trust or that it was wrongful or improper. These principles have been recognized and endorsed in a long line of decisions of this Court beginning with *Hawes v. Oakland* (1882) 104 U. S. 450⁽¹⁾ which indeed was the inspiration for old Equity Rule 94, the predecessor of Rule 27.

The complaint alleged in this behalf that the Board of Directors was dominated by Petitioner. This was denied, no evidence was produced to sustain it and the trial court made no finding thereon. The attempt of the court below to repair this error by a general statement that it was satisfied "that the Appellants had the right to bring suit" is merely to declare in substance that whenever a board of directors refuses to bring suit on demand, then a stockholder may, without more, bring suit on the corporation's alleged cause of action.

As shown by the dissenting opinion, the rule announced below is in conflict with applicable decisions

(1) *Corbus v. Alaska Treadwell Gold Mining Co.*, 187 U. S. 455; *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U. S. 261; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288.

of this Court and opens the federal courts to any stockholder who (whether in good faith or bad) seeks to substitute his judgment on questions of managerial policy for that of the board of directors, enabling him to compel and conduct litigation of the corporation's claims, real or false, even though the directors are disinterested, and, in the exercise of an honest discretion as to the rights and best interests of the corporation, believe it should not be done.

The rule thus announced not only destroys the principle that the directors, not individual stockholders, should decide questions of management, but goes further, and makes the federal courts the agency for destroying that principle (since virtually all state courts, including California, hold the contrary).

This, we submit, is at variance with the applicable decisions of this Court, as well as Equity Rule 27 and Civil Procedure Rule 23B, and we may add with the decisions of the Supreme Court of California (*Waymire v. San Francisco Railway*, 112 Cal. 646, 649, and cases cited in the attached brief).

The decision of the court below, unless reversed, will be cited (in addition to a holding that no wrongful refusal need be shown) as authority for the proposition, and has already been digested and reported in the National Reporter System as establishing the rule that:

“In derivative suit by national bank stockholders to recover amounts received by bank president for arranging bank loan, complaint,

alleging demand upon bank's board of directors to bring action and their refusal to bring it, *held* sufficient under equity rule requiring complaint to set forth with particularity plaintiff's failure to secure action by managing directors or trustees. Equity Rules, rule 27, 28 U. S. C. A. following section 723; Rules of Civil Procedure for District Courts, rule 23(b), 28 U. S. C. A. following section 723c."

Fleishhacker v. Blum, 109 Fed. (2d) 543, head-note 6.

The error just described is emphasized by the fact that the trial court refused to permit Petitioner to introduce evidence offered to show: (a) The results of the investigation made by the Bank in considering the demand that it bring suit on the claim here involved; (b) The reasons which impelled the Board of Directors to adopt a resolution not to bring the suit; (c) That the Board did not refuse wrongfully or violate its trust in so refusing, and that it acted without adverse interest or domination or control by Petitioner or others; (d) That this suit was brought for ulterior reasons, namely, to force settlement of a wholly unrelated claim against the Bank.

Moreover, the decision excluding this evidence, opens the federal courts to collusive suits wherein no true diversity of citizenship exists:⁽¹⁾ this because, if (as

(1) Here both Petitioner and the Bank are citizens of California, and the basis of federal jurisdiction is diversity. (R 293-94)

held here) such reasons are immaterial as a matter of substantive law, then no inquiry may be had.

2. The Court below has Decided an Important Question of Law in a Way Conflicting with Applicable Local Decisions, as well as Decisions of this Court, and has Applied the Rule of Laches and the Statute of Limitations in such a Way as to Open the Federal Courts to Unlimited Speculation in Stale Charges of Fraud.

In California actions of this character are governed by Section 338 subdivision 4 of the Code of Civil Procedure, which provides that actions for relief on the ground of fraud or mistake must be brought within three years and that "the cause of action in such case (is) not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

The California decisions uniformly require both at law and in equity that when a complaint shows on its face that the action has been filed beyond the statutory period of three years, there must be specific allegations excusing the delay by showing that the facts constituting the fraud or mistake were not discovered by the aggrieved party until within the statutory period, and further that these allegations must be proved. (*Earl v. Lofquist*, 135 Cal. App. 373; *Lady Washington Co. v. Wood*, 113 Cal. 482; *Pourroy v. Gardner*, 122 Cal. App. 521; *Consolidated Reservoir*

& *Power Co. v. Scarborough*, 216 Cal. 698.) The decisions of this court establish the same rule (*Wood v. Carpenter*, 101 U. S. 135) and point out that in cases of this kind, the complainant is held to stringent rules of pleading and evidence.

Here the aggrieved party was the Bank. (*People v. Noyo Lumber Co.*, 99 Cal. 456; 16 Cal. Juris. pp. 503, 504.) The action was filed 15 years after the alleged cause of action arose. The complaint contains no allegations whatever directed to showing the Bank did not have knowledge until within three years of the filing of the action or that the Bank was adversely dominated or controlled during the period of delay, or even attempting to excuse its failure to file suit within the statutory period. There is no evidence excusing such delay. The court failed to find any facts excusing such delay.

There was therefore complete failure here to comply with either the California law or the Federal law.

But the error goes deeper, for not only did the plaintiffs fail in their burden of proving lack of notice, but the trial court actually found that the Bank had notice at the time. This compelled a finding that the action was barred, but the court made no such finding because of its erroneous conception that the stockholders and not the Bank were the aggrieved parties.

The court below, after pointing out that the plaintiffs failed to make the necessary allegation, and the

court failed to make the necessary finding,⁽¹⁾ erroneously proceeded to supply this essential and contradictory finding.

But although the court below admitted that "the burden of proving lack of discovery by the Bank rested upon appellees" (R 914), it nevertheless rested its finding that the Bank did not have notice, on evidence which Petitioner introduced to show affirmatively that the Bank did have notice at the very time of the transaction, i. e., 15 years before suit brought. In short the court not only used evidence of what Petitioner disclosed at the time the loans were made as proof that the Bank did not know all of the essential facts at that time, but went further and held this same evidence (there being no other) sufficient to sustain the plaintiffs' admitted burden of proving that at no time during the many years that followed did the Bank's officers know, or discover, or have reason to suspect, anything beyond what they are shown to have known in 1919. (This was also contrary to the California and Federal rule requiring, in the absence of any evidence, a finding against the party having the burden of proof. *Golson v. Dunlap*, 73 Cal. 157, 161; 24 Cal. Juris. 937-8.)

Whether the rule to be applied is laches or the Statute of Limitations, the result is the same. The decision of the court below opens the federal courts

(1) As pointed out in the accompanying brief, the trial court (contrary to the statement of the court below) actually found that the officers of the Bank had knowledge of the facts at the time. (R 190, 191, 313)

to unlimited speculation in stale charges of fraud, and is contrary to the applicable local decisions and the decisions of this Court.

3. The Court below has Departed from the Accepted and Usual Course of Judicial Proceedings and has Sanctioned such a Departure by the Trial Court.

The formal findings in the trial court were prepared by plaintiffs' counsel and were signed without alteration by the trial judge. (R 766) They depart in numerous important particulars from the trial court's opinion (which the trial court ordered they should be in accordance with (R 197)) and in many essentials are unsupported by or contrary to the evidence. These findings were used by the court below as the basis of its decision; but it went further, and upon concluding that the trial court had failed to find on essential issues, itself relied on findings imported by plaintiffs' attorney, and supplied the necessary findings by drawing inferences from the findings so prepared; and supplied other findings (also drawn by inference from the findings so prepared) at variance with those of the trial court.

The accepted and usual course in such cases, and that contemplated by the Rules of Civil Procedure is that the findings shall be prepared by the trial judge, or, if prepared by counsel, shall accurately reflect the court's view of the facts. See *Process Engineers v. Container Corp.*, 70 F. (2d) 487; *Brenger v. Brenger*, 142 Wis. 26; *Nashville Ry. Co. v. Price*, 125 Tenn. 646.

It is further the accepted and usual course when the trial court has failed to find upon an essential

issue or has misconceived the applicable law that the case should be reversed with directions to dismiss or sent back for further proceedings in the trial court. See *Indiana Farmers Guide Pub. Co. v. Prairie Publishing Co.*, 293 U. S. 268, 281.

**4. The Court below Erred in Finding that
Petitioner Received a Bonus for a Loan
of the Bank's Funds and Received a Profit
for which he Must Account to the Bank.**

This is not a case in which the "two court" rule as to findings of fact is applicable; essential findings of the trial court and the court below are contradictory.

The evidence shows without contradiction that Petitioner received his interest in the partnership venture in consideration of his contribution of half its capital, and not as a consideration for the Bank loan; that he had such partnership interest before the loan was even thought of; that the loan was made in behalf of the Bank, not by Petitioner, but by its Finance Committee, with knowledge of Petitioner's interest supplied by Petitioner: that the loan was a desirable one, secured by Liberty Bonds, and was repaid in four months: and that there was no secrecy.

These being the facts, and having in mind that when these loans were made a national bank president, his partners, and an enterprise in which he was personally interested, could borrow from his bank;⁽¹⁾ that

(1) *National Bk. Commerce v. National Bank of Missouri*, 30 Fed. Cas. 1121, 1122; *Blair v. First National Bank*, 3 Fed. Cas. 577, 580; *Gallin v. National City Bank*, 273 N. Y. S. 87, 97; 7 *Michie, Banks and Banking* (Perm. Ed.) p. 270; 1 *Michie op. cit.*, p. 145.

a partnership or corporation in which he has a 50% interest, may now, under affirmative Act of Congress, borrow from such bank;⁽¹⁾ that it is not a breach of trust for a bank president to recommend a bank loan to be used in a venture in which he has an interest, provided the loan is properly safeguarded, and his interest is known to those who make the loan in behalf of the Bank, as was the case here: that fraud is never presumed and the presumption against it approximates that of innocence of crime: that if an inference of fair dealing can as readily be drawn as an inference of corrupt practice, then it is the express duty of the court to draw the inference of fair dealing, it seems inconceivable that 19 years after the transaction, a judgment for almost \$800,000 should be rendered against Petitioner, whose affairs are now in the bankruptcy court. Particularly is this so where the suit was filed 15 years after the event by stockholders whose inspiration was a desire to obtain evidence to be used in other litigation adverse to the Bank, and where the ultimate finding of fraud and crime was based solely on inference and conjecture.

WHEREFORE, Petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Hon-

(1) 12 U. S. C. §375a (Banking Act of 1933, chap. 89, §12, 48 Stat. 182, as amended June 14, 1935, 49 Stat. 375; Aug. 23, 1935, 49 Stat. 716; April 25, 1938, 52 Stat. 223; June 20, 1939, 53 Stat. 842). cf. Rulings of Federal Reserve Board, Fed. Res. Bulletins, April 1936, pp. 249 and 250; Proceedings Subcommittee Banking and Currency Committee, U. S. Senate, 74th Congress, 1st Session, pp. 79-100.

orable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and of the proceedings of said court in the case numbered and entitled in its docket as "No. 9021, Herbert Fleishhacker, Harry T. Thompson, Victor Klinker, Palo Alto Stock Farms, Inc., a corporation, and The Anglo-California National Bank of San Francisco, a national banking association, Appellants, vs. Lucien Blum, Edmond Lang, Elizabeth Lang, Rene Fould, Esther Fould, Max Lazard, Roger Haas, Andre Haas, Lucie Emile Lewylier, S. A. Johannesson, G. O. Hoffman, and Henry Leon, Appellees", and that the decree of said court be reversed by this Court with directions to dismiss the bill, and for such further relief as to this Court may seem proper.

Dated: San Francisco, California, June 21, 1940.

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